82-6928

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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MARVIN E. FRANKEL
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

RICHARD H. BURR, III
224 Datura Street, 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

LAURIN A. WOLLAN, JR.
1515 Hickory Avenue
Tallahassee, Florida 32303

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's systematic, secret, ex parte solicitation and consideration of extra-record, prison-generated psychological evaluations and similar materials of questionable reliability concerning capital appellants in cases pending before it for sentencing review violate the fifth, sixth, eighth and fourteenth amendments?

2. May a death sentence that is based in part upon improperly considered aggravating circumstances be affirmed and executed pursuant to an appellate rule that explicitly disregards evidence of nonstatutory mitigating circumstances?

3. Does the eighth amendment requirement of reliability in capital sentencing permit the sentencer to impose death without any guidance concerning the level of certainty that it must have in determining that sufficient aggravating circumstances exist, that they outweigh mitigating circumstances, and that death is accordingly the appropriate punishment?

4. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of identical jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982)?

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Petitioner, ALVIN BERNARD FORD, prays that a writ of certiorari issue to review the en banc judgment of the United States Court of Appeals for the Eleventh Circuit filed January 7, 1983. Rehearing was denied on March 17, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 696 F.2d 804 (11th Cir. 1983), and is set out at pages 1a-80a of the Appendix.*/ The order denying rehearing is set out at App. 81a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on January 7, 1982, and petitioner's timely petition for rehearing was denied on March 17, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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*/ Citations to the Appendix accompanying this petition are designated App. ___.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth amendment to the Constitution which provides in relevant part:

> No person ... shall be compelled in any criminal case to be a witness against himself ...;

the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 82a-83a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On July 26, 1974, an indictment was filed in the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida, charging petitioner with the July 21, 1974, murder of police officer Dimitri Walter Ilyankoff during the course of the attempted robbery of a restaurant. RPC. 254.[1/] On

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1/ References to the various portions of the record relevant to this proceeding are designated as follows:

(a) transcript of the trial in the Circuit Court for the Seventeenth Judicial Circuit of Florida, held December 9-18, 1974, as "T";

(b) record on appeal to the Supreme Court of Florida following the denial of post-conviction relief as "RPC";

(c) orders of the District Court and other documents filed in the District Court, as "R"; and

(d) a supplement to the foregoing District Court record, known as the "FIRST SUPPLEMENTAL RECORD ON APPEAL," as "SR."

December 17, 1974, following an eight-day trial, petitioner was convicted of murder in the first degree. T. 1300-1301. On January 6, 1975, following a jury recommendation of death, Mr. Ford was sentenced to death.

The Supreme Court of Florida affirmed the conviction and death sentence on July 18, 1979, and denied rehearing on September 24, 1979. Ford v. State, 374 So.2d 496 (Fla. 1979); App. 84a-91a. On April 14, 1980, certiorari was denied. 445 U.S. 972 (1980).

It was subsequently discovered that, in connection with its appellate review of capital cases, the Florida Supreme Court had, ex parte, regularly solicited and reviewed prison-generated psychological reports and similar evaluations of death-sentenced inmates. On September 29, 1980, Mr. Ford joined with 122 other capital defendants in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court challenging this practice. That court dismissed the application for failure to state a claim upon which relief could be granted. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); App. 92a-99a. This Court denied certiorari. 454 U.S. 1000 (1981).

Mr. Ford then commenced state post-conviction proceedings. His motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 was denied by the Circuit Court in Broward County, and its denial was affirmed by the Supreme Court of Florida. Ford v. State, 407 So.2d 907 (Fla. 1981); App. 100a-103a. His subsequent petition for habeas corpus in the United States District Court for the Southern District of Florida was denied in an unreported order and opinion, App. 104a-118a, and Mr. Ford appealed. On April 15, 1982, a divided panel of the Eleventh Circuit affirmed the District Court's denial of relief. Ford v.

Strickland, 676 F.2d 434 (11th Cir. 1982); App. 119a-141a. Rehearing en banc was granted. The en banc court -- despite sharp division over four of the seven issues presented -- affirmed the district court's judgment. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1982); App. 1a-80a. Further rehearing was denied. App. 81a.

B. Facts Relevant to the Questions Presented

This petition seeks review of a crucial decision issued by the Eleventh Circuit en banc "for the purpose of resolving for this Circuit several important issues that repeatedly arise in capital cases." App. 4a.[2/] The issues were the subject of sharp division within the en banc court below. The facts giving rise to each issue are set forth seriatim.

(1) Petitioner's Challenge to the Florida Supreme Court's Ex Parte Solicitation, Receipt, and Consideration of Evaluative Materials Concerning Capital Defendants Whose Appeals Were Before the Court.

Since at least as early as 1975, the Supreme Court of Florida has, without the knowledge of the appellants or their counsel, requested, received, and considered materials from state executive officials relating to death-sentenced appellants in pending appeals. The existence of this practice has not been disputed by respondents or the Florida court. Nor can it be in light of the extensive documentary proof. The only thing not certain is the full extent of the practice, which, because of its secret nature, may never be known.

When the practice came to light, a proceeding was instituted by Mr. Ford and other Florida capital appellants asserting

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2/ Eleven of the twelve active judges participated in the en banc proceeding. The twelfth, Judge Hatchett, was disqualified because of his participation in Mr. Ford's case while he had been a Justice of the Supreme Court of Florida.

numerous violations of their federal constitutional rights. Since the proceeding complained of conduct by the Supreme Court of Florida, it was filed directly with that court as an application for extraordinary relief and petition for writ of habeas corpus. The petition and its appendices are set out in the Supplemental Appendix.[3/] Citing considerations of "judicial economy because of the common issues of law and fact presented," Supp. App. 2b, more than a hundred prisoners under sentences of death joined in the petition.

Petitioners alleged that the Supreme Court of Florida

> has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evalutions or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole investigation reports; probation and state prison classification and admissions summaries . . . .
>
> Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Supp. App. 2b-3b. An appendix to the petition documented the practice with copies of correspondence from the Office of

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3/ An attempt was made to introduce the materials contained in the Supplemental Appendix into the record in Mr. Ford's case in the district court. It was, however, foreclosed by the district judge, who stated that he was "only interested in this case, and all that about other cases is totally irrelevant." SR. 9. Nonetheless, because the Supplemental Appendix contained only the pleadings filed in the Florida Supreme Court, the court of appeals below treated those materials as properly before it.

References to the Supplemental Appendix are designated as Supp. App. _____.

the Clerk of the Supreme Court of Florida to officals of the Department of Corrections requesting "the latest psychiatric evaluation" of named capital appellants, Supp. App. 81b, 93b, 95b, 101b, 104b, 106b, 108b, 110b, 115b, and 118b; return correspondence from Department of Corrections officials transmitting the requested information, Supp. App. 58b, 64b, 82b, 93b, 96b, 98b, 102b, 105b, 107b, 109b, 111b, 114b, 117b, and 119b; and notations of telephone requests by the Clerk for similar information, Supp. App. 33b, 40b, 50b, 51b, 55b, 64b, 65b, 70b, and 129b. An example of the correspondence from the Clerk of the Court follows.

Supreme Court of Florida
Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE
904-488-0125

February 10, 1978

Mr. Ed. Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Bobby Marion Francis,
vs. State of Florida
Case No. 50,127

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

Supp. App. 118b.[4/] This documentation was, perforce, "merely exemplary," Supp. App. 3b, because of the secret nature of the communications to and from the court and the fact that "a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it ..., has at the Court's direction been destroyed or purged from [the] . . . Court's files." Id.

The petition asserted that the Florida court's practice violated the petitioners' rights "under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States," Supp. App. 3b, "the right to counsel as guaranteed by the Sixth and Fourteenth Amendments," id., "the Eighth Amendment," id., "the privilege against self-incrimination as guaranteed by the Fifth Amendment," id., and "the right to confrontation as guaranteed by the Sixth Amendment." Id. at 4b. Each of these contentions was briefed. Id. at 4b-13b.

Petitioners moved for the appointment of a special master and for hearings to resolve the factual issues if any of their allegations were materially controverted. But they never were controverted. When the court issued an order to show cause, Supp. App. 184b, the respondent replied by filing a motion to dismiss that neither disputed the facts alleged in the petition nor alleged any contrary facts. Id. at 185b-193b.

4/ As the response to this particular request demonstrates, the Department typically did all it could to provide the "latest" evaluation possible. The Department's response enclosed

> ... the latest psychiatric report available on [Mr. Francis]. Because there is not a more recent evaluation available, I have requested the staff at Florida State Prison to complete an updated psychological evaluation and forward it to my office. This report should be available in the very near future.

Supp. App. 119b.

After oral argument,[5/] the Supreme Court of Florida denied the petition on the merits as a matter of law.[6/] It held that:

> Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

App. 96a. Drawing a distinction between sentence "review" and sentence "imposition," id.; see also id. at 98a, the court concluded that: "Since we do not 'impose' sentences in capital cases, Gardner[7/] presents no impediment to the advertent or inadvertent receipt of some non-record information." Id. at 97a. "[N]on-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'" Id. at 97a-98a. Accordingly: "As we view the case, . . . appellate review can never be compromised, in the constitutional sense required by Proffitt,[8/] by the receipt of any quantity of non-record information." Id. at 98a n.16. "The upshot . . . is that petitioner's claims are untenable." Id. at 98a. All relief was denied as to each petitioner. Id.

5/ The transcript of the oral argument before the Supreme Court of Florida is contained in Supp. App. 194b-257b.

6/ The court criticized the procedure of joining multiple habeas corpus petitioners in a single petition, and said that "[i]n the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily." App. 95a. However, in the present case, "[t]o avoid absurd technicalities," the court "decline[d] to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown." Id. The court's final order was that "[t]he petitions of Brown and others for writs of habeas corpus and for other extraordinary relief are denied." App. 98a.

7/ Gardner v. Florida, 430 U.S. 349 (1977).

8/ Proffitt v. Florida, 428 U.S. 242 (1976).

The Brown petitioners sought review in this Court, but certiorari was denied. Brown v. Wainwright, 454 U.S. 1000 (1981). Dissenting from this denial, Justices Marshall and Brennan recognized that "petitioners might seek to develop the record on these issues further in a federal habeas corpus proceeding." Id. at 1003. Mr. Ford did attempt to develop a fuller record in federal habeas corpus. The district court, however, denied discovery, denied Mr. Ford's proffer of available evidence concerning the Florida Supreme Court's practice, SR. 8-9, and adopted the Florida court's conclusions of law in Brown. App. 110a-111a. On appeal, the Eleventh Circuit disavowed the Florida court's legal conclusions and "assume[d] without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional." Id. at 7a (plurality opinion). Nevertheless, it found no violation of Mr. Ford's constitutional rights because it read the Florida Supreme Court opinion in Brown to contain a factual statement that the Florida court had not "used" the nonrecord material. Id. at 7a-8a (plurality opinion); id. at 29a-30a (Tjoflat, J., concurring). Five of the eleven judges participating in the en banc decision dissented. Two judges (Godbold and Clark) found that the Florida Supreme Court had not clearly stated whether it relied on the nonrecord material, id. at 17a-18a; two judges (Kravitch and Johnson) found in separate opinions that the Florida Supreme Court admitted (or failed to deny) an unconstitutional use of the nonrecord material, id. at 42a-50a, 69a-71a; and the fifth judge (Anderson) joined all of the others' dissenting opinions. Id. at 73a.

(2) Petitioner's Challenge to the Florida Rule Permitting the Affirmance of a Death Sentence Based in Substantial Part Upon Legally Improper Aggravating Circumstances When There Are Only Nonstatutory Mitigating Circumstances.

At the sentencing phase of Mr. Ford's trial, the court twice instructed the jury to consider all eight of the aggravating circumstances specified in the Florida death penalty statute. T. 1347-1348, 1354-1356. Thereafter, the jury returned a general advisory verdict recommending the death penalty. T. 1358. The trial judge imposed the death sentence and filed supporting findings in which he found all eight of the statutory aggravating circumstances. App. 88a-90a. On direct appeal, the Florida Supreme Court set aside three of the eight aggravating circumstances: Two had no evidentiary basis, and the third involved an impermissible double-counting of aggravation.[9/] Nonetheless, the court upheld the imposition of the death sentence, because "there being no mitigating factors present death is presumed to be the appropriate sentence. Elledge v. State, 346 So.2d 998 (Fla.1977); State v. Dixon, [283 So.2d 1 (Fla. 1973)]." Id. at 91a. With respect to its conclusion that there were "no mitigating factors present," the court explained: "We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitiga-

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9/ Two circumstances -- that the defendant was under sentence of imprisonment when the homicide was committed, Fla.Stat. § 921.141 (5)(a) (West Supp. 1982), and that the defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence, id., § 921.141 (5)(b) -- were set aside for lack of evidence. App. 89a-90a. Two other circumstances -- that the homicide was committed while defendant was engaged in the attempted commission of a robbery, id., § 921.141 (5)(d), and that the homicide was committed for pecuniary gain, Id., § 921.141 (5)(f) -- were reduced to a finding of a single aggravating circumstance since both were based upon the same aspect of the crime. App. 90a-91a.

tion during the sentencing trial.... [But o]ur duty under section 921.141, Florida Statutes (1975), ... is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts" of the case under review. Id. (emphasis added).

In federal district court, Mr. Ford claimed that the eighth amendment forbade the affirmance of a death sentence when nearly half of the aggravating circumstances supporting it were held improper and the rule relied on to affirm this result denied consideration of nonstatutory mitigating circumstances. The district court rejected this claim with the terse statement that Proffitt v. Florida, 428 U.S. 242, 255 (1976), required that the Florida statutory provisions "be considered as they have been construed by the Supreme Court of Florida." App. 109a-110a.

The en banc Eleventh Circuit affirmed the district court by a seven-to-four majority. The majority accepted without discussion the Florida court's determination that there were "no mitigating factors present." App. 12a and 19a. It did not, therefore, address the constitutionality of an appellate rule ("the Elledge rule") that disregards evidence of nonstatutory mitigating circumstances. Rather, it upheld the application of the Elledge rule in Ford on three grounds: (1) that the sentencer had not considered improper evidence; it merely gave weight to improper considerations based upon otherwise admissible evidence, id. at 11a; (2) that because there were no mitigating circumstances, there was no risk that the sentencer's discretion had been misguided because the Florida Supreme "[C]ourt logically presumed the weighing process would have reached the same outcome even had the

sentencing court not added to the scales those aggravating circumstances found impermissible...," id. at 12a; and (3) that this presumption "seem[ed] very like the application of a harmless error rule." Id.

In dissent, three judges questioned the Florida court's conclusion that there were no mitigating circumstances. Id. at 36a n.32 and 64a-65a n.44. But they found no need to resolve this issue because of their views either that Zant v. Stephens, 456 U.S. 410 (1982), required certification of a question to the Florida Supreme Court, App. 31a-41a, (Tjoflat, joined by Anderson, JJ., dissenting), or that the decisions on the merits in Zant and Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___, 103 S.Ct. 340 (1982), would so clearly be controlling that decision ought to be deferred. App. 61a-68a (Kravitch, J., dissenting). A fourth dissenter, Judge Johnson, concluded that the Florida Supreme Court's disregard of nonstatutory mitigating circumstances in applying the Elledge rule was a violation of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). App. 72a-73a.

(3) Petitioner's Challenge to Florida's Failure to Require That the Sentencer Be Convinced Beyond a Reasonable Doubt That Aggravating Circumstances Outweigh Mitigating Circumstances.

The Florida statute requires that both the jury's recommendation and the judge's sentence of death must be premised on "findings ... as to the facts" that "sufficient aggravating circumstances exist as enumerated in [the statute], and ... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla.Stat. §§ 921.141(2) and (3) (West Supp. 1982). In Mr. Ford's penalty trial, the

jurors were instructed that they must make these findings before they could recommend death. However, they were not told that they must make these findings beyond a reasonable doubt. T. 1345-1346. Similarly, although the trial judge made these findings before he imposed Mr. Ford's death sentence, he did not indicate that he made them beyond a reasonable doubt. App. 89a-90a n.1.

In the district court, Mr. Ford claimed that the eighth and fourteenth amendments require that these findings be made beyond a reasonable doubt. The district court held merely that "Proffitt v. Florida ... is sufficient itself to reject the claim." App. 109a.

By a nine-to-two vote, the en banc Eleventh Circuit affirmed the district court's conclusion on two grounds. First, the majority reasoned that the determinations made at the penalty trial are not of "facts or elements of the crime" which, under In re Winship, 397 U.S. 358 (1970), require proof beyond a reasonable doubt. App. 15a. Rather, they involve the weighing of facts against each other, a process "not susceptible to proof by either party." Id. Second, because these sentencing determinations are central to Florida's capital punishment scheme which the Court declared constitutional on its face in Proffitt, the majority concluded that adherence to the Florida scheme provided Mr. Ford a constitutionally proper sentencing proceeding. Id.

Dissenting, Judges Anderson and Clark recognized that the determinations made by the jury and judge in a capital sentencing proceeding are not simple "findings of fact" since they involve the weighing of subsidiary facts and the application of a measure of subjective judgment. Id. at 76a and n.6. But they found that difference immaterial, relying on Addington v. Texas, 441 U.S. 418 (1979), and Santosky v. Kramer, 455 U.S. 745 (1982).

To them, the relevant question was the requisite "degree of confidence in the accuracy of the finding that the death penalty is warranted." App. 76a. This Court's insistence that especially reliable "procedures ... govern the sentencing process in a death case," id. at 74a, compelled the dissenters to find that a standard reflecting "subjective certainty" -- i.e., the reasonable doubt standard -- was necessary to guide the critical judgments underlying a decision to impose death. Id. at 78a-80a.

(4) Petitioner's Challenge to Instructions That Might Well Lead a Reasonable Juror to Conclude That the Jury was Forbidden to Consider Relevant Mitigating Circumstances.

The instructions to the jury at the penalty phase were that:

> As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following [whereupon the court read the list of aggravating circumstances specified in the death penalty statute] ....
>
> As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following [whereupon the court read the list of mitigating circumstances specified in the statute] ....

T. 1347-1349 (emphasis added). During the jury's deliberations, the foreman requested reinstruction concerning the aggravating and mitigating circumstances that the jury could consider. In the exchange that followed: (1) the judge told the foreman that the "list" of factors in the charge constituted "the mitigating and aggravating circumstances" the jurors were to consider; (2) the foreman told the other jurors that the "list" of factors in the charge constituted "what they [the judge and counsel] consider the aggravating circumstances; what they consider the mitigating circumstances;" and (3) the judge then reread to

the jury the entire portion of the instructions specifying the aggravating and mitigating circumstances to be considered. T. 1351-1356 (emphasis added).

In the district court, Mr. Ford claimed that these instructions were calculated to lead a reasonable juror to believe that he or she could consider only the statutory mitigating circumstances enumerated in the instructions. Since the bulk of his mitigating evidence did not relate to the statutory circumstances, these instructions precluded its consideration.

The district court found that, because there was no objection, "Wainwright v. Sykes [, 433 U.S. 72 (1977)] controls." App. 107a. But it went on to determine the merits. It held that any error in the instructions was harmless on two grounds. Id. at 107a-109a. First, unlike the Mississippi death penalty procedure under which a similar jury charge was held unconstitutional in Washington v. Watkins,[10/] the Florida procedure "has sentencing of death by a judge and the jury's verdict is only advisory." App. 108a. Second, the district court believed that the trial judge would reimpose the death sentence even if Mr. Ford's case were remanded for a new penalty trial. Id. at 108a-109a.

The en banc Eleventh Circuit affirmed. On the merits, a six-judge majority believed it "a rational conclusion ... that the jury did not perceive a restriction on the use of any mitigating evidence." App. 10a. Four reasons were given for this conclusion. First, the majority pointed to the use of the

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10/ Washington v. Watkins, 655 F.2d 1346, 1367-1378 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

word "only" in the instruction to consider "only the following" aggravating circumstances, in contrast to its omission in the instruction to consider "the following" mitigating circumstances. It noted that the same omission in the language of the statute had led this Court in Proffitt, 428 U.S. at 250 n.8, to assume that the statute did not limit the consideration of mitigating circumstances to those listed in the statute. App. 9a. Second, the majority distinguished the instructions in Ford from those condemned in Washington v. Watkins on the ground that the Ford instructions had not included the limiting reference in the Washington instructions to the two "preceding elements of mitigation." App. 9a-10a. Third, since "petitioner was not limited in the introduction of evidence which might be considered mitigating and ... the jury arguments encompassed all evidence introduced in the case," id. at 10a, the majority reasoned that "the jury was not in fact being limited to [sic] what it could consider." Id. Finally, because the trial judge seemed to understand his duty to consider all the mitigating evidence proffered by Mr. Ford, the majority found "[i]t ... reasonable to conclude that the state judge's perception of what could be considered was conveyed to the jury." Id.

Alternatively, the majority held that Mr. Ford had not demonstrated sufficient prejudice to excuse his failure to raise this claim in the Florida courts. Id. (adopting the reasoning in Chief Judge Godbold's opinion, id. at 19a). First finding that petitioner had committed a procedural default under Florida law -- since he "neither objected to the instruction at trial nor raised it on direct appeal," id. at 9a -- the majority then inquired under Wainwright v. Sykes whether petitioner had shown sufficient cause and prejudice to relieve

him of the default. App. 9a-10a and 19a. It passed the issue of "cause," id. at 9a, and concluded that his demonstration of "prejudice" was insufficient because, in its view, it was unlikely that the jury's verdict would have been any different if it had considered the nonstatutory mitigating evidence. App. 10a.

Dissenting from the court's disposition of this claim, Judge Kravitch would have held that Mr. Ford had sufficiently demonstrated cause and prejudice and that, under the principles articulated in Sandstrom v. Montana, 442 U.S. 510 (1979), the the record showed a violation of the eighth amendment requirements of Lockett and Eddings. She noted that the Fifth Circuit had so held in Washington v. Watkins, where the error was indistinguishable. App. 50a-61a.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S SECRET, EX PARTE SOLICITATION, RECEIPT, AND CONSIDERATION OF REPORTS FROM STATE EXECUTIVE AGENCIES CONCERNING CAPITAL LITIGANTS WHOSE APPEALS WERE THEN PENDING FOR SENTENCING REVIEW PRESENT VITAL CONSTITUTIONAL QUESTIONS WHICH SHOULD BE RESOLVED BY THIS COURT

May an appellate court secretly gather and consider extra-record information concerning the appellants and issues before it for review? The question arises from the Florida Supreme Court persistent practice of soliciting from state agencies extra-record information regarding death-sentenced appellants in connection with their pending appeals, without notice to the appellants or their lawyers and without the sanction of any statutory or procedural authority which might have given notice of the practice. By a narrow six-to-five vote, the Eleventh Circuit found this startling practice acceptable. It based that determination on an untenable inference that the Florida Supreme Court deliberately and regularly obtained ex parte

information of a vital nature but then failed to "use" it. This conclusion is belied by even the truncated record that Mr. Ford has been permitted to make. The regular resort to secret evidence in affirming capital sentences demands correction on the most basic of constitutional grounds.

The constitutional questions presented are not unfamiliar to this Court. They were raised in a different setting in a petition for certiorari following the Florida Supreme Court's ruling in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This Court declined to exercise its jurisdiction at that time. Brown v. Wainwright, 454 U.S. 1000 (1981). Whatever considerations led the Court to deny certiorari in Brown, the current posture of this case makes it the final opportunity for any court to resolve these questions in a seemly and intelligible manner before petitioner and numerous other condemned Florida prisoners are put to death. These questions call for review by this Court at this time for several reasons.

First, at the time of the Brown petition, it was still possible that the constitutional grievances presented would be corrected in federal habeas corpus proceedings. Now it is not possible. The en banc ruling of the Eleventh Circuit was expressly intended to preclude and will have the effect of precluding any further consideration of these constitutional issues in this or any other case.

Second, at the time of Brown, the factual record was scanty because of the Florida court's denial of petitioners' request for an evidentiary hearing and its decision solely on the pleadings. Thus, under 28 U.S.C § 2254(d), there was a chance that the record would be developed in federal habeas.

Now there is no chance. The Eleventh Circuit not only affirmed the denial of the evidentiary hearing sought by Ford, but based its rejection of his constitutional contentions on an interpretation of the Florida court's Brown opinion which forecloses a factual hearing in this or any other case.

Third, the Eleventh Ciruit's badly divided ruling leaves the question of the propriety of the Florida Supreme Court's secret practice unresolved and virtually unaddressed. The majority view was expressed in two opinions. The plurality opinion by Judge Roney assumed that resort by an appellate court to ex parte materials in reviewing capital sentences would violate Gardner. However, it read the Brown opinion as asserting that the Florida court did not "use" the materials it had solicited. Judge Tjoflat, the decisive sixth vote, concurred specially. He determined that the Florida court had read the materials but that it did not rely on them. App. 29-30a. He then noted that he might have voted differently if Mr. Ford had separately alleged the appearance of impropriety in the Florida Supreme Court's practice, thinking -- incorrectly[11/] -- that Mr. Ford had not done so. App. 30a. The five dissenting judges

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11/ The appearance of impropriety was raised throughout the litigation. Mr. Ford has consistently asserted that the very solicitation and receipt of the non-record information by the Florida court violated his due process and eighth amendment rights. Application for Extraordinary Relief and Petition for Writ of Habeas Corpus at 3-5, 8-16 & 13-14; Petition for Writ of Habeas Corpus at 20; Brief for Petitioner-Appellant at 57, 62-64, 68 & 70-73; Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 7, 14-15, & 18. He has consistently cited Gardner v. Florida, 430 U.S. 349 (1977), which explicitly states that "any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion." Id. at 358 (plurality opinion) (emphasis added). Gardner did not separate justice and the appearance of justice as distinct and independent issues, but viewed them as inseparably yoked. By citing Gardner as applied to facts which inescapably bring both of its connected theories into play, Mr. Ford has properly raised both issues.

took the view either that the Florida court had not been clear whether it had relied on the materials or that the Florida court had admitted using them. App. 17a-18a, 42a-50a, & 69a-71a. Thus, the sharp, five-one-five division of the en banc court merely clouds the fundamental question.

Fourth, the only thing the en banc court did seem to agree on was its unwillingness to accept the legal basis of the Florida Supreme Court's decision in Brown. The Florida court had upheld its challenged practice on the theory that Gardner is inapplicable to appellate review. App. 96a-97a. The plurality opinion below, however, "assume[d] without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional." App. 7a. Thus, the prevailing state and federal court opinions upholding the Florida practice stand on radically divergent legal theories. This is unseemly, to say the least, if the appearance and reality of constitutional justice in capital cases are to be preserved.

Fifth, the en banc majority decision cannot withstand analysis. Its major premise is that the Florida court did not "use" the ex parte materials. It arrives at this premise by reading the Brown opinion as holding that the Florida court did not "use" the materials,[12/] and by treating this "holding" as a finding of fact. But the majority's attempt to extract such a factual finding from the Brown opinion's ambiguous language and faulty legal reasoning is conclusively rebutted by the procedural posture of Brown, the actual holding in Brown, and the record.

12/ In part, the majority's conclusion rested on the premise that state law (as announced in Brown) prohibited the use of such materials and that there is a presumption of regularity in state court proceedings. The systematic, secret, ex parte solicitation and consideration of such materials, however, should be enough to shake that presumption.

1) The procedural posture: The Brown opinion could not have made any factual findings because the procedural posture of Brown permitted only conclusions of law. Brown was filed in the Florida Supreme Court as an original action; there were no findings of lower courts there on review. The Brown petitioners filed a motion for factfinding proceedings before a special master in the event that any of their factual allegations were controverted. This motion was never reached because the factual allegations were not controverted. Brown was decided on the state's motion to dismiss. In that posture, all of the petitioners' factual allegations were assumed to be true; the decision could only be rendered as a matter of law. Thus, no factual issues could conceivably have been resolved. Since the Florida Supreme Court bypassed petitioner's request for a hearing, conceded every factual allegation, and resolved the matter solely as a question of law, the majority's attempt to read into Brown a finding of fact with a presumption of correctness[13/] is plainly in error.

2) The Brown holding: The Brown opinion itself did not make factual findings but only discussed legal issues. The Florida court accepted petitioners' factual allegations of solicitation, receipt, and consideration of the ex parte materials and ruled as a matter of law that they presented no constitutional violation. It distinguished between the functions of sentence "imposition" and "review," App. 96a, 97a, & 98a, and held that Gardner applies solely to sentence imposition. Since "non-record information we may have seen ... plays no role in capital sentence 'review'...," App. 97a-98a, "[a]s we

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13/ See Sumner v. Mata, 449 U.S. 539 (1981), and 28 U.S.C. 2254(d). But see Edwards v. Arizona, 451 U.S. 477, 482-84 (1981) (different treatment for state court finding premised on misapplication of governing constitutional law).

view the case, ... appellate review can never be compromised, in the constitutional sense ..., by the receipt of any quantity of non-record information." App. 98a n. 16. It then concluded that: "Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant ... to our appellate function in capital cases...." Id. (emphasis added). There is simply no basis in the language[14/] or reasoning[15/] of the Florida court's opinion for the factual "finding" attributed to it by the majority.

14/ In dissent, Chief Judge Godbold noted:

> I read the Brown opinion differently [from the majority]. It seems to me that the Florida Supreme Court, adopting the subjunctive mode in its opinion, has not directly stated that it did not actually rely on non-record information.... The disparate views that the judges of this court have expressed about the import of Brown convincingly demonstrate the intractable ambiguity of the Florida Supreme Court's opinion.

App. 18a.

15/ In dissent, Judge Johnson clearly explained that the Florida Supreme Court's opinion had nothing to do with the factual question of whether that court had "used" the information that it secretly acquired:

> It is important to note that the Florida Supreme Court has never denied considering non-record material of the kind alleged in this case. Instead, the court merely attempted to draw a legal distinction between the statutory "review" process and constitutionally required "supervisory standards." The majority's acceptance of this distinction, in my opinion, is nothing more than the adoption of a legal conclusion expressed by the Florida Supreme Court. Even where the court in Brown stated that "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence 'review,'" 392 So.2d at 1332-33, the court was only articulating its statutorily imposed duty. It was not stating its actual practice. For this reason I find it unnecessary to discuss the "presumption of regularity" relied on in part by the majority.

App. 71a. (emphasis added).

3) The record: The Florida Supreme Court's own opinions and practices belie the majority's premise that the Florida court did not "use" the ex parte materials. In reaching its legal conclusion in Brown, the Florida court accepted the allegations regarding the "non-record information we may have seen," App. 97a, its "reading of non-record documents," App. 98a, and "[t]he 'tainted' information we are charged with reviewing." App. 98a n.17. In a subsequent case, it made clear that Brown "held that the allegations of receipt and consideration of such information by appellate judges, even if true, did not establish error...." McCrae v. Wainwright, 422 So.2d 824, 827 (Fla. 1982) (emphasis added). Thus, the Florida court has gone out of its way to enumerate every conceivable constituent of its questionable practice -- receiving, seeing, reading, reviewing, and considering ex parte materials -- and to uphold the practice as constitutionally permissible.

Moreover, the practice itself demonstrates the hollowness of the en banc majority's semantic distinction between "use," on one hand, and "solicit," "receive," "see," "read," "review," and "consider," on the other.

> If the court does not use the disputed non-record information in performing its appellate function, why has it systemically sought the information?

Brown v. Wainwright, 454 U.S. 1000, 1001 (1981) (Marshall, J., dissenting from the denial of certiorari). If the Florida court "solicited the material with the thought it should, would or might be used" and then decided "that it should not be so used...," as the en banc majority suggested, App. 8a, then why did it continue to solicit such materials over a period of years? The Florida court's attempted response -- which even the en banc majority viewed as less than "candid," App. 8a --

only compounds the issue. It said that: "The 'tainted' information we are charged with reviewing was ... in every instance obtained to deal with newly articulated procedural standards ...," specifically identifying Lockett. App. 98a n.17.[16/] But if that is true, the Florida court must have "used" the materials. And if in fact they were used for capital appellants' benefit, why conceal it? If the materials were never used, or only used to advantage capital appellants, why order the materials purged from the court's files when the practice was discovered?

The six-to-five majority conclusion that the Florida court did not "use" the materials is also belied by actual experience. An oral argument before the Florida Supreme Court makes the point. Seventeen-year-old Paul Magill had been sentenced to death. At oral argument, his counsel urged that a life sentence should have been imposed. She relied, in part, upon psychiatric information presented to the trial court. But she was then questioned by the Chief Justice of the Florida Supreme Court about an inconsistent, extra-record psychological evaluation that the Florida court had secretly obtained from the prison.[17/] What clearer "use" could there be?

16/ In fact, the practice began in 1975, three years before Lockett. See App. 9a.

17/ The appendix below contains a motion by Magill's appellate counsel. The motion reveals that during oral argument then-Chief Justice Overton referred to a psychological screening report prepared after Mr. Magill's sentencing and after his incarceration on death row. The report was discussed by the Chief Justice in relation to the presence or absence of mitigating circumstances in the case, an issue that bore directly on whether the death sentence imposed upon Mr. Magill should have been reversed or affirmed. The death sentence was in fact vacated by the Florida Supreme Court because of the trial court's failure to articulate the mitigating circumstances it may have considered. Magill v. State, 386 So.2d 1188 (Fla. 1980). The reimposition of the death sentence was later affirmed. Magill v. State, 428 So.2d 649 (Fla. 1983).

Sixth, the Florida court's own resolution of these questions is no more satisfactory. It was based on the purported distinction between sentence "imposition" and "review." In the Florida court's view, "[n]either of [the court's] sentence review functions ... involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." App. 96a. As a result, "nonrecord information [the Justices] may have seen, even though never presented to or considered by the [trial] judge, the jury, or counsel, plays no role in capital sentence 'review.'" App. 97a-98a.

This analysis fails for several reasons. To say that nonrecord information has no proper place in the Florida court's appellate review is not to say that such information cannot affect that court's performance of its function. Manifestly, it can. The Florida Supreme Court undertakes a proportionality review: to "review [each death] case in light of the other decisions and determine whether or not the punishment is too great." Proffitt, 428 U.S. at 251 (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Secret evidence that tends to support, refute, or clarify the nature of the aggravating and mitigating circumstances in the cases being compared--such as prison classification records showing violence or in-prison psychiatric reports purporting to document lack of remorse, future dangerousness, or mitigating psychiatric disorder -- would necessarily affect such a proportionality review. Indeed, the Florida justices would have to be superhuman to ignore such evidence, which they specifically solicited in connection with that review, once they had read and considered it.

Moreover, the Florida Supreme Court's review function is not nearly as circumscribed as the Brown opinion suggested. It had previously described the Florida capital sentencing process

as "trifurcated." See, e.g., Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979). Under its prior opinions, its review included "a separate responsibility to determine independently whether the imposition of the penalty is warranted." Songer v. State, 322 So.2d 481, 484 (Fla. 1975) (emphasis added), vacated on other grounds, 430 U.S. 952 (1977). This duty to make an independent determination requires the Florida court to "evaluate anew the aggravating and mitigating circumstances ...." Harvard v. State, 375 So.2d 833, 834 (Fla. 1977), cent. denied, 441 U.S. 956 (1979). Accord Peek v. State, 395 So.2d 492, 500 (Fla.), cert. denied, 451 U.S. 964 (1981); Vasil v. State, 374 So.2d 465, 471 (Fla. 1979); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Adams v. State, 341 So.2d 765 (Fla. 1977); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). This Court relied on that duty in upholding the Florida statute in Proffitt. 425 U.S. at 253. The secret consideration of questionable but untested ex parte materials such as in-prison psychiatric reports clearly can affect a reviewing court's determinations of the appropriateness of a capital sentence, whether that determination involves a reweighing of the aggravating and mitigating circumstances or merely an evaluation of the acceptability of the original sentencer's weighing.

Seventh, the issues presented here beg the reasoned examination that only the granting of certiorari now can provide. The abstruse analysis of the en banc majority did not dispose of some borderline or frivolous constitutional claim. It sanctioned a practice fundamentally at war with due process. The gross unfairness of a procedure governing life and death where non-record information is secretly acquired and considered by an appellate court calls into question the traditional foundations of our system.

Whether or not capital defendants are entitled to "a greater degree of reliability" in the process that sends them to their death, Lockett, 438 U.S. at 604; see, e.g., Gardner, 430 U.S. at 364, they are entitled to the protections of due process, to the effective assistance of counsel, to confront the evidence against them, and to be free of cruel and unusual punishment and compulsory self-incrimination. No less than other litigants, they are entitled to an orderly and regular course of judicial proceedings in which evidence is received and tested by the traditional adversary methods of the Anglo-American system of justice. But the Florida Supreme Court practice challenged here is more evocative of the Star Chamber[18/] than the reasoned, reliable review required by this Court's precedents.

When this practice came to light, despite the Florida court's efforts to keep it secret and to purge its files, petitioner and other similarly situated death row prisoners duly pursued their remedies in both the state and federal courts. In one place, they were told that no findings of fact need be made because the practice was constitutionally acceptable. In the other, they were told that the practice might well be unconstitutional but that findings of fact never made established that it had not really occurred. Nothing could be more unseemly than to have an issue of such magnitude, affecting so many lives and raising such fundamental questions about the operation of the

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18/ The Star Chamber, which operated during the reign of the Tudors, was empowered both to proceed solely on rumor and to compel self-incrimination. It was abolished by Act of Parliament in 1641 because of popular revulsion at its practices. The challenged Florida court practice included clandestine consideration of untested psychological reports -- some made by corrections personnel, App. 95a -- based on in-prison evaluations which the death sentenced prisoners had little ability to avoid and which they were not warned would be used against them in their pending capital appeals. See Estelle v. Smith, 451 U.S. 454 (1981).

judicial process, "resolved" with finality by so contradictory a course of proceedings. This Court's judgment on the issue can alone set the matter right.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE EIGHTH AMENDMENT PERMITS THE EXECUTION OF A DEATH SENTENCE BASED IN PART ON IMPROPER AGGRAVATING CIRCUMSTANCES WHEN THE APPELLATE RULE CONDONING THIS RESULT EXPRESSLY DISREGARDS EVIDENCE OF NONSTATUTORY MITIGATING CIRCUMSTANCES

The issue underlying the question presented here is similar to those in botn Barclay v. Florida, No. 81-6908, and Zant v. Stephens, No. 81-89: whether a death sentence that rests, in part, upon improper aggravating circumstances may nonetheless be affirmed on review and carried out. The present case, however, adds a dimension to Barclay and Zant that makes it particularly appropriate for consideration by this Court.

Here, the state law premise upon which the Florida Supreme Court affirmed Mr. Ford's death sentence is clearly articulated: the two-pronged rule of Elledge v. State, 346 So.2d 998 (Fla. 1977). The Elledge rule provides that a sentence premised in part on improper aggravating circumstances will be vacated if there are any statutory mitigating circumstances present. This result is dictated by the necessity to "guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Id., 346 So.2d at 1003. But under the second prong of the Elledge rule, the sentence must be affirmed if there are no statutory mitigating circumstances:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. Section 921.141(2)(b) and (3)(a), Florida Statutes.

Id. at 1002-1003 (emphasis deleted). The application of this prong of the Elledge rule to Mr. Ford's case was expressly grounded on the absence of the "mitigating circumstances duly enacted by the representatives of our citizenry." App. 91a. The Florida Supreme Court acknowledged that "testimony favorable to appellant's character and prior behavior [had been] presented by the defense in mitigation during the sentencing trial." Id. Such nonstatutory mitigating evidence simply does not count for Elledge purposes.

The very statement of the Elledge rule reveals its constitutional infirmity. If there are nonstatutory mitigating circumstances present, then the consideration of improper aggravating circumstances taints the weighing process just as surely as when statutory mitigating circumstances are in the balance -- upsetting the "informed, focused, guided and objective inquiry" required by innumerable precedents. See, e.g., Proffitt, 428 U.S. at 259; Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980). And insofar as the Elledge rule prevents consideration of nonstatutory mitigating circumstances at the appellate level, it is a plain violation of Lockett and Eddings: The disregard of nonstatutory mitigating circumstances as a matter of law by an appellate court in order to sustain an otherwise improperly imposed death sentence differs not at all from the

disregard of such circumstances in the first instance by the sentencer in order to impose the death sentence. Eddings, 455 U.S. at 113-14.[19/]

The majority opinion below does not address the question actually presented by this case. It inexplicably accepts without discussion the Florida court's conclusion that there were no mitigating circumstances present. App. 12a (plurality opinion); App. 19a -20a (Godbold, C.J., and Clark, J., concurring). In dissent, only Judge Johnson clearly recognizes that the Florida Supreme Court's disregard of nonstatutory mitigating circumstances violates Lockett and Eddings. App. 73a.[20/]

Judge Roney's plurality opinion on the Elledge issue is entirely unsatisfactory for another reason. It attempts to distinguish situations in which the consideration of aggravating circumstances is improper because they are unconstitutional or nonstatutory, as in Zant or Henry v. Wainwright,[21/] from situations in which the consideration is improper because of a

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19/ A third constitutional infirmity of the Elledge rule need not be reached in this case. Even if there were no mitigating circumstances at all, affirmance under the Elledge rule would be constitutionally impermissible because the appellate court could not determine whether the sentencer would have found the proper aggravating circumstances sufficient to justify a death sentence. Put another way, a general sentence based in part upon proper considerations and in part upon improper ones would have to be vacated under the principles of Stromberg v. California, 283 U.S. 359 (1931), and its progeny. This is the question presented in Zant; an affirmance in Zant would, therefore, require reversal here.

20/ The other three judges who dissented with respect to the court's resolution of this issue questioned the Florida Supreme Court's conclusion that there were no mitigating circumstances. They found no need to press the subject, however, because of their view that the matter should have been resolved under the third question raised by the application of the Elledge rule, discussed supra n.19. App. 36a-37a, 65a, and 73a-74a.

21/ 661 F.2d 56 (5th Cir. 1981) (Unit B), vacated and remanded, ___ U.S. ___, 102 S.Ct. 2922 (1982), judgment reinstated, 686 F.2d 311 (5th Cir. 1982) (Unit B), cert. pending (No. 82-840).

lack of evidence to establish the circumstances, as in Ford. App. 11a. That distinction must fail. The constitutional infirmity of predicating a death sentence in part upon improper aggravating circumstances is that sentencing discretion is not sufficiently channeled[22/] when it is channeled in part by considerations that should have played no role. As this Court framed the question presented in Zant, the focus must be on the effect that improper consideration of aggravating circumstances has upon the channeling process, rather than on why consideration was improper. 455 U.S. at 416-17.[23/]

The plurality's alternative ground -- adopting Chief Judge Godbold's characterization of the Elledge rule as a harmless error rule, App. 12a & 19a-20a -- is equally flawed. First, it fundamentally misunderstands the Elledge rule as employed by the Florida Supreme Court. The Elledge rule does not involve a particularized harmless error analysis to determine on the facts of each case whether an improperly considered aggravating circumstance distorted the weighing process. Rather, it is a categorical rule based on a legal proposition. Under Elledge, the improper consideration of any aggravating circumstances after the consideration of one proper one must be harmless in the absence of statutory mitigating circumstances.

22/ "[I]f a State wishes to authorize capital punishment... [i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted).

23/ This analysis fails for another reason: Petitioner did allege consideration of constitutionally improper aggravating circumstances. In his petition for a writ of habeas corpus in the district court and on appeal to the Eleventh Circuit, Mr. Ford claimed that three of the five aggravating circumstances which the Florida Supreme Court determined to have been properly considered should have been set aside as well, because the application of these circumstances to the facts of Mr. Ford's case violated the principle of Godfrey v. Georgia, 446 U.S. 420 (1980).

"[I]n the weighing process which is dictated by our statute," Elledge, 346 So.2d at 1003, the absence of statutory mitigating circumstances leaves nothing to balance against even a single proper aggravating circumstance. Thus, to call this a harmless error rule does not avoid the fact that the legal premise of the Elledge rule violates Lockett.

Second, even if Elledge were a particularized fact-based harmless error rule, its application to this case could not be squared with Chapman v. California, 386 U.S. 18 (1967). Where there are substantial nonstatutory mitigating circumstances -- as the Florida court recognized here, App. 91a -- the improper consideration of three out of eight aggravating circumstances can hardly be considered harmless beyond a reasonable doubt.

Accordingly, certiorari should be granted to determine the constitutional propriety of the application of the Elledge rule to Mr. Ford's case.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PERMITTING A JURY AND JUDGE TO IMPOSE THE DEATH SENTENCE WITHOUT ANY GUIDANCE CONCERNING THE LEVEL OF CERTAINTY THEY MUST HAVE IN THE CORRECTNESS OF THE JUDGMENT THAT DEATH IS APPROPRIATE SATISFIES THE STANDARDS OF RELIABILITY CONSTITUTIONALLY REQUIRED IN CAPITAL SENTENCING

It is well settled that the death penalty can be constitutionally imposed only pursuant to procedures that assure "reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Until now, this concern for reliability has focused on the need for guidance respecting the range of factual matters considered by the sentencer. See Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S.

153, 195 (1976). In this regard, the Court has assumed that adequate guidance is provided "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt, 428 U.S. at 258.

However, now that the statutes that gave rise to these holdings have been "clarified in concrete cases," Zant, 456 U.S. at 414, a previously unrecognized threat to reliability in capital sentencing has emerged. This threat arises not from the indeterminacy of the factual matters that the sentencer may consider but from the indeterminacy of the "level of subjective certainty," Santosky, 455 U.S. at 769, that the sentencer must reach about the correctness of the several fact-based determinations leading to the ultimate conclusion that death is the appropriate punishment in that particular case. See Woodson, supra. Under Florida law, the sentencer must find the existence of some aggravating circumstances and it may or may not find mitigating circumstances. It then must determine whether the aggravating circumstances are "sufficient" to warrant the death penalty. If there are mitigating circumstances, it must determine whether they are outweighed by the aggravating factors. Fla. Stat. § 921.141 (2) and (3). What standard guides the sentencer's exercise of judgment concerning each of these life-or-death determinations?

The area for uncertainty is large. When, for example, a jury considers whether aggravating circumstances are sufficient to warrant the death penalty and whether aggravating circumstances outweigh mitigating circumstances,

> [i]t seems . . . entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty.

Smith v. North Carolina, ___ U.S. at ___, 103 S.Ct. 474, 474-475 (1982) (Stevens, J., dissenting from denial of certiorari). In such a case, the death penalty can nevertheless be imposed pursuant to the Florida statute -- "in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605 -- because the jury has no guidance as to the proper manner in which to resolve such doubt. Thus, at the very core of the process, the sentencer is left to its own inherently arbitrary devices.

This risk of unreliability can be minimized only by requiring capital sentencing determinations to be made under a "reasonable doubt" standard. Standards of proof serve "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington, 441 U.S. at 423. "Where one party has at stake an interest of transcending value...this margin of error is reduced as to him by the process of placing on the other party the burden...of persuading the factfinder...beyond a reasonable doubt." Speiser v. Randall, 357 U.S. 513, 525-26 (1958). The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. at 364. Given this Court's persistent concern that the decision to impose the death penalty be reliable in proportion to its importance, see, e.g., Woodson, 428 U.S. at 305, the use of the reasonable doubt

standard as a test of "the degree of confidence our society thinks [the sentencer] ... should have in the correctness" of his or her capital sentencing determinations, Addington, 441 U.S. at 423 (quoting Winship, 397 U.S. at 370 (Harlan, J., concurring)), seems particularly appropriate.

The majority opinion below failed to recognize these principles. It held that a reasonable doubt standard is not required because the judgments made in capital sentencing are not factual judgments but involve the weighing of facts. Yet, regardless of how one characterizes the nature of the various determinations made by the capital sentencer, they require "a large measure of judgment." App. 76a n.6 (Anderson, and Clark, JJ., dissenting). The applicability of some standard of certainty to these determinations, as well as the propriety of "reasonable doubt" as the standard, is, as Judge Anderson succinctly observed, "near obvious." App. 78a.

The majority also rejected this conclusion on the ground that it was foreclosed by Proffitt's general endorsement of the Florida statue. App. 15a. But the Court has recently made clear that its approval of a state's capital sentencing statute on its face does not foreclose later challenges to specific procedures, since the Court's earlier "review of the statute did not lead us to examine all of its nuances." Zant, 456 U.S. at 414. Although critical to the administration of the death penalty, the present issue has never been submitted to or addressed by this Court. The Court should, therefore, grant the writ to determine whether the eighth and fourteenth amendments require that, before a determination is made to recommend or impose the death penalty in a specific case, the sentencer must reach a "subjective state of certitude," In re Winship, that death is the appropriate punishment.

IV. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE PROPER CONSTITUTIONAL ANALYSIS OF CAPITAL SENTENCING INSTRUCTIONS THAT A REASONABLE JUROR COULD UNDERSTAND TO PRECLUDE CONSIDERATION OF NONSTATUTORY MITIGATING FACTORS AND TO DETERMINE THE PROPER APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES TO THIS INSTRUCTIONAL ERROR

The jury instructions at Mr. Ford's capital sentencing trial might well have led a reasonable juror to believe that he or she was permitted to consider only statutory mitigating circumstances, in violation of the Lockett and Eddings requirement that the sentencer must consider all relevant mitigating evidence. The result was to preclude consideration of virtually all of the evidence proffered by Mr. Ford in mitigation, since only a small portion related to statutory mitigating circumstances. The en banc court rejected this Lockett contention on alternative grounds. It held on the merits that, despite the alleged defects in the instructions, "a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating circumstances." App. 10a. Alternatively, the court held that a procedural default in the state courts barred federal review because Mr. Ford failed to demonstrate "prejudice" as required by Wainwright v. Sykes and United States v. Frady, 456 U.S. 152 (1982). Id.

Certiorari should be granted on this issue for several reasons. The en banc court's holding on the merits conflicts with this Court's precedents regarding analysis of jury instructions for constitutional defects, see Sandstrom v. Montana, 442 U.S. 510 (1979); Taylor v. Kentucky, 436 U.S. 478, 489-490 (1978), and with the resolution of precisely the same issue by the United States Court of Appeals for the Fifth Circuit. See Washington v. Watkins, 655 F.2d 1346, 1367-1378 (5th Cir.), reh. denied, 622 F.2d 1116 (5th Cir. 1981), cert. denied, 456

U.S. 949 (1982). The holding on procedural grounds applies the "prejudice" prong of Sykes's "cause" and "prejudice" test in a way that runs afoul of important eight amendment principles.

A. The en banc court's treatment of the jury instructions conflicts with this Court's precedents regarding analysis of the constitutionality of jury instructions and with the resolution of the same issue by the Fifth Circuit.

Under Sandstrom, proper analysis of the constitutionality of jury instructions "requires careful attention to the words actually spoken to the jury, ... for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Id., 442 U.S. at 514. Judicial interpretation of the law upon which an instruction is premised is not determinative; what counts is "the interpretation which a jury could have given the instruction." Id. at 516-517. In analyzing the jury instructions at issue in this case, the court below purported but failed to follow these principles. In addition, its failure to follow Sandstrom set it in conflict with the Fifth Circuit's decision in Washington v. Watkins.[24/]

The court below based its ruling on four reasons. First, it stressed the fact that the trial court instructed the jury to "consider the following" statutory mitigating factors but had instructed them to "consider only the following" aggravating factors, a direct paraphrase of the statute. It noted this Court's observation in Proffitt, 428 U.S. at 250

24/ Even though the Eleventh Circuit adopted as "binding ... precedent" the decisions of the United States Court of Appeals for the Fifth Circuit "as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date," Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), and Washington was decided on September 14, 1981, the Eleventh Circuit nonetheless failed to follow Washington in this case. Presumedly, this was based on the Eleventh Circuit's position that, as an en banc court, it is free to reject prior Fifth Circuit panel opinions. See Sullivan v. Wainwright, 695 F.2d 1306, 1310 n.7 (11th Cir. 1983); Stein v. Reynolds Securities, 667 F.2d 33, 34 (11th Cir. 1982). Thus, the decision here is in conflict with the Fifth Circuit.

n.8, that the statute does not preclude consideration of non-statutory mitigating factors. Second, it distinguished the Fifth Circuit's decision in Washington on the ground that there the trial court had also directed the jury's attention to two previously enumerated mitigating circumstances. In Ford, however, no parallel instruction was given. Third, it noted that since evidence of nonstatutory mitigating factors was admitted, "the jury was not in fact being limited to [sic] what it could consider." App. 10a. Finally, it noted a passage in the judge's sentencing opinion that found there were no nonstatutory mitigating factors to outweigh those in aggravation. It found it "reasonable to conclude" from the trial judge's correct understanding of the law that his perception was conveyed to the jury. Id.

Nothing about the court's analysis comports with Sandstrom. Its ultimate holding was only that "a rational conclusion" is that the jury did not think it was precluded from considering evidence of nonstatutory mitigating circumstances; it did not find that no reasonable juror could have interpreted the instructions that way. But another and more rational conclusion based on the language of the instruction and the subsequent exchanges between the jury and the court is that the jury did think itself precluded. Certainly, "a reasonable juror could have interpreted the instruction..." that way. Sandstrom, 422 U.S. at 514 (emphasis added). "That reasonable men might derive a meaning from the instructions given other than the proper [and constitutional rule of law] is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). Thus, there was constitutional error.

Moreover, when one considers the four reasons that led the

court below to its "rational conclusion," it becomes apparent both that the court did not follow Sandstrom and that its conclusion is not rationally supported.[25] With regard to the first reason, the Fifth Circuit had previously considered the identical jury charge and convincingly rejected the conclusion later reached by the Eleventh Circuit:

> In instructing the jury as to the two aggravating factors that were at issue in the case, the trial court quite properly made it clear to the jury that it could consider only those two aggravating factors, and no others: "Now consider only the following elements of aggravation in determining whether the death penalty should be imposed...." (Emphasis added.) Almost immediately thereafter, in language that almost exactly paralleled that in which the trial court circumscribed the jury's consideration of aggravating factors, the court told the jury to consider the two statutorily prescribed mitigating factors hat were at issue in the case: "Now consider the following elements of mitigation in determining whether the death penalty should not be imposed...." (Emphasis added.) Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating -- were the sole fctors that he was permitted to consider in the discharge of his oath....
>
> The State suggests that, to the contrary, the omission of the word "only" from the instruction as to mitigating circumstances would lead a reasonable juror to infer that his consideration of mitigating factors was not limited to those announced by the trial court. Perhaps an extraordinarily attentive juror might rationally have drawn such an inference from the omission of this single word. Indeed, such narrow parsing of language is far from unknown in the related context of judicial interpretation of legislative pronouncements. Nonetheless, at best the State's argument suggests that there is more than one reasonable interpretation of the crucial langauge in the charge; this does not mean the charge is not constitutionally infirm, for the Supreme Court has held that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonble juror could have interpreted the instruction." Sandstrom 442 U.S. at 514, 99 S.Ct. at 2454 (emphasis added).

25/ To be sure, the en banc court's failure to find under Sandstrom that a reasonable juror could have thought himself precluded was premised on its reading of Frady, 456 U.S. at 170, to shift the burden to petitioner to demonstrate that the jury was misled. App. 9a. We show below both that the court misapplied Frady and that the jury was indeed misled.

Washington, 655 F.2d at 1370 (footnotes omitted) (emphasis in original).

Similarly, the court's reliance on this Court's observation in Proffitt is misplaced. Sandstrom makes clear that no matter how persuasive or authoritative a judicial interpretation may be, "it is not the final authority on the interpretation which a jury could have given the instruction." 422 U.S. at 516-17. This Court's observation in Proffitt does not suggest that the language of the instruction -- which tracked the statute -- was clear on its face. Virtually every court in Florida, including the Florida Supreme Court itself, had parsed the same statutory language and made the opposite interpretation. See Cooper v. State, 336 So.2d 1133, 1139 & n.7 (Fla. 1976) (holding that the same language limits consideration to the aggravating and mitigating circumstances listed in the statute). The en banc court's conclusion about how a jury would have understood this instruction is based on a sophisticated judicial parsing of language that no jury could be expected to make[26/] -- even if it had the text in front of it, which it did not -- and that even the Florida Supreme Court did not achieve.

The second factor relied on by the court below was its purported distinction of Washington on the ground that, in Washington, the trial judge had made a further reference to "the preceding [two enumerated] elements of mitigation." Washington's holding of constitutional error clearly relied primarily upon the portion of the Washington instructions that is identical to those in the present case; its reference to

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26/ The en banc majority's didactic parsing of the jury instruction in a way that no lay juror could reasonably be expected to duplicate is uncomfortably reminiscent of its reading of the Brown court's subjunctive assumption of the petitioners' factual allegations as a "finding of fact." See Point I, supra.

the "preceding elements" passage was merely corroborative. If corroboration of the effect of the instructions common to the two cases is needed, it is found in Ford in greater measure than in Washington. The original instructions in Ford left the jury uncertain about which mitigating circumstances they were permitted to consider. As a result, the foreman asked the judge during deliberations for additional instruction concerning the permissible aggravating and mitigating circumstances. As noted above: (1) the judge told the foreman that the "list" of factors in the charge constituted "the mitigating and aggravating circumstances" which the jurors were to consider; (2) the foreman repeated to the other jurors that the "list" of factors in the charge constituted "what they [the judge and counsel] consider the aggravating circumstances; what they consider the mitigating circumstances"; and (3) the judge thereupon read the entire offending, syntactically parallel portion of the original instructions to the jury a second time. T. 1351-1356 (emphasis added). Thus, it is obvious that the jury found the original instructions far less clear than did the en banc majority. The judge's subsequent efforts only reinforced the erroneous impression that the statutory mitigating circumstances were exclusive.

The en banc court's third reason was that the jury did hear evidence and argument on the nonstatutory mitigating factors. But the question is not whether the jury heard the evidence, it is whether the jury thought it was permitted to consider it. The sentencers in Lockett and Eddings also heard the nonstatutory mitigating evidence. But, as Washington explains, the "evidence and argument" analysis

> completely miss[es] the point of the ... holding in Lockett. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued

> their relevance to the sentencer. The fatal flaw in Lockett was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.
>
> Neither should [the] challenge fail because ... counsel adverted to nonstatutory mitigating circumstances during closing argument. As the Supreme Court has noted in a related context, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936-37, 56 L.Ed.2d 468 (1978).

655 F.2d at 1375.

The en banc court's fourth reason provides even less support for its conclusion. Nothing in the trial judge's sentencing opinion, written after the jury returned its death verdict, could possibly indicate what the jury might or did perceive from the instructions given prior to its deliberations. That the trial judge correctly understood the law has no bearing on what the jury thought if he didn't tell them. The court below did not and cannot point to a single word of the instructions or any of the proceedings in the jury's presence that purportedly conveyed this "perception" to them.

B. The court of appeals' holding that there was insufficient "prejudice" under Wainwright v. Sykes, 433 U.S. 72 (1977), to excuse a procedural default presents an important question of federal law that has not been, but should be, settled by this Court.

As an alternative ground, the en banc court held that Mr. Ford had not demonstrated sufficient prejudice to excuse his failure to raise the jury instruction claim "at trial [or] ... on direct appeal." App. 9a, 10a and 18a-19a. Having determined that Mr. Ford had committed a procedural default under Florida law,[27/] the en banc court passed over the question

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27/ Subsequent to the ruling in Ford, counsel became aware that the Florida Supreme Court does not in fact follow a consistent procedural default rule that can serve as "an independent and adequate state procedural ground that bars the

whether Mr. Ford had shown sufficient cause for his default[28] and focused on whether there was sufficient prejudice resulting from the claimed constitutional error to warrant its review on the merits. App. 9a, 10a and 19a. Applying the Court's

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27/ continued

federal courts from addressing the issue on habeas corpus." County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979). In his state post-conviction proceedings in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the petitioner raised the same instructional error as that presented here. Compare id. at 831 with App. 101a. Straight's former counsel had committed the same procedural default as Ford's. Compare Straight, 422 So.2d at 829-39 with App. 102a. Yet in Straight, the Florida Supreme Court reached the merits of the claim, 422 So.2d at 831, while in Ford, the court refused to consider the issue because of the prior procedural default. App. 101a.

This inconsistency, it turns out, is by no means rare. Compare Alvord v. State, 396 So.2d 184 (Fla. 1981); Smith v. State, 400 So.2d 956, 958-959 (Fla. 1981); Goode v. State, 403 So.2d 931, 932 (Fla. 1981); Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1982); Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982); Antone v. State, 410 So.2d 157, 163 (Fla. 1982); Thomas v. State, 421 So.2d 160, 162 (Fla. 1982) (court finds procedural defaults) with Douglas v. State, 373 So.2d 895, 896-897 (Fla. 1979); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Demps v. State, 416 So.2d at 809; Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982); Hall v. State, 420 So.2d 872, 873-74 (Fla. 1982) (court reaches merits despite failure to raise issue on direct appeal).

In effect, Florida's procedural default "rule" is merely a device by which the state court can turn on or off at will its receptivity to constitutional claims. Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458 (1958). The result is that, when they subsequently present their constitutional claims in federal habeas corpus proceedings, some death sentenced petitioners are able to obtain rulings on the merits while others are not. Since the determination of a capital sentencing issue on the merits can mean the difference between life and death, the lightning-like arbitrariness of Florida's procedural default "rule" cannot be sanctioned because it results in the same random cruelty condemned in Furman.

28/ The en banc court did not rule on the "cause" requirement. However, it did note that, prior to Ford's trial in 1974, the Florida courts had consistently ruled that only statutory circumstances could be considered in mitigation. Indeed, the Florida Supreme Court so ruled two years later in Cooper v. State, 336 So.2d at 1139 and n. 7 (1976). Lockett was not decided until 1978, four years after trial. Thus, there was no way counsel could have foreseen this constitutional development and known to raise it at trial.

articulation of the "prejudice" standard in Frady, 456 U.S. at 170, the court reached the conclusion that Mr. Ford's demonstration of prejudice was insufficient.

> The nonstatutory mitigating evidence consisted of testimony by Ford's mother and girlfriend about his family life, education, and work history and testimony by a psychiatrist portraying him as a bright young man frustrated by dyslexia. We agree with Chief Judge Godbold that failure to consider this testimony would not create a substantial likelihood that there was actual and substantial disadvantage to the defendant.

App. 10a.

The en banc court's analysis misreads Frady, misapplies this Court's precedents under the eighth amendment regarding the critical importance of consideration of all relevant mitigating evidence, and conflicts with the Fifth Circuit's decision in Washington. It also seriously distorts the nature of the nonstatutory mitigating evidence submitted to the jury in this case.

Under Frady, the petitioner must show "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," 456 U.S. at 170 (emphasis in original); there must be a "substantial likelihood the erroneous . . . instruction prejudiced [his] chances with the jury." Id. at 174. Plainly, there was such a substantial likelihood here. A fundamental principle of this Court's cases governing capital sentencing is that the sentencer must be permitted to consider all mitigating evidence. This Court has never hesitated to reverse a death sentence if the sentencer's consideration of mitigating circumstances was in any way restricted. Woodson v. North Carolina, 428 U.S. at 303-305; Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 331-334 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977); Lockett, 438 U.S. at

607-608; Green v. Georgia, 442 U.S. 95, 97 (1979); Eddings, 455 U.S. at 113-14. Accord Washington, 655 F.2d at 1375. If the instructions in Ford limited the jury to considering only statutory mitigating circumstances -- as we have shown they did -- then Mr. Ford suffered "actual and substantial disadvantage."[29/] Since the consideration of all mitigating evidence is "constitutionally indispensible," Woodson, 428 U.S. at 304, this disadvantage "so infected the sentencing proceedings as to drain them of fundamental fairness." Washington, 655 F.2d at 1376.

Moreover, in not one of the cases where the Court has reversed because mitigating evidence was excluded from consideration has it considered the strength, substantiality, or persuasiveness of the mitigating evidence that the sentencer was prevented from considering. The only touchstone has been relevance. If relevant mitigating evidence has been excluded from the sentencer's consideration, the death sentence has been reversed.

> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration [footnote omitted] . . . . On remand the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them.

Eddings, 455 U.S. at 114-15, 117. Accord Washington, 655 F.2d at

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29/ The bulk of the mitigating evidence that Mr. Ford proffered was not relevant to any of the statutory mitigating circumstances. See discussion infra at 46. The court below does not suggest that it could have been considered by the jury in connection with any of the enumerated statutory mitigating circumstances.

1375. In contrast to this clear principle -- which recognizes both the intractable nature of the decision to impose death and the inappropriateness of a federal appellate court's substituting itself for the sentencer -- the en banc court has imported a "weighing" test into the analysis of whether a capital defendant was "prejudiced" by the exclusion of some mitigating evidence. This should not stand unreviewed.

Finally, it should be noted that the en banc majority seriously distorted the nature and importance of the mitigating evidence in this case. As summarized by the dissent:

> Ford's mother testified that his father had been a belligerent alcoholic during his childhood. She described petitioner's efforts as a boy, to assume paternal responsibilities toward his younger siblings, including working during high school and after graduation to provide financial support for the family. A psychiatrist testified that Ford was bright and an overachiever but that he suffered from a type of brain damage known as Dyslexia, which results in a difficulty working with numbers. The psychiatrist described Ford's generally successful endeavors in his employment, which were subsequently thwarted when a promotion placed him in a position requiring mathematical computations. In the psychiatrist's view, Ford's actions in committing the robbery and murder stemmed from intense depression and frustration related to his disability rather than from a lack of moral standards. The psychiatrist stated that he believed petitioner could be rehabilitated.

App. 58a. Even if a weighing test could be indulged to second-guess the sentencer's decision in matters governing life and death -- a proposition entirely without support in this Court's decisions [30/] -- there is no way an appel-

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30/ In Frady, the Court did review the evidence to determine whether the verdict would have been different. However, Frady involved a determination of guilt, closely bound by legal rules defining the elements of the offense and the burden of proof demanded for conviction. It did not involve predicting the reaction of a jury to mitigating evidence in the context of the delicate decision to take or spare a human life. See People v. Hines, 390 P.2d 398, 402 (Cal. 1964).

late court can determine what sentence a jury would have rendered had it been permitted to consider the evidence just described. This is particularly true here, where the other side of the equation was unfairly weighted by the improper consideration of at least three of the eight aggravating circumstances. See Point II, supra. If the Court's admonitions regarding reliability in capital sentencing are to have any meaning, the writ should be granted.

CONCLUSION

For the reasons express herein, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

MARVIN E. FRANKEL
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

RICHARD H. BURR, III
224 Datura Street, 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

LAURIN A. WOLLAN, JR.
1515 Hickory Avenue
Tallahassee, Florida 32303
(904) 222-4245